

International climate change adjudication: A means to amplify voices of the global south?

Shubhangi Agarwalla

2019-10-07T10:02:05

Traditionally, the UN Climate change regime has been premised on an intergovernmental negotiations paradigm where political actors play the dominant role in the development of norms. In this post, I argue for using international adjudication as a supplementary tool to complement international negotiations. Adjudication, which entails the participation of impartial, third-party decision makers, might help us overcome blind spots of negotiations by redistributing argumentative burdens and providing an expressive function to change norms. However, international adjudication is unlikely to solve all challenges in the climate change regime. There are certain obstacles to a successful action since it is difficult to demonstrate a causal link between specific tangible harms with actions of a state. Moreover, international adjudication lacks compulsory jurisdiction and enforcement authority. Finally, states are likely to feel a stronger sense of responsibility to norms that they have agreed to as opposed to norms imposed on them from outside. For the purpose of this post, I make two assumptions: First that climate change is a [real and pressing challenge](#). Second, countries of the Global South deserve compensation for damages caused by climate change since they have [contributed the least to the problem and have limited resources to respond](#). Climate change adjudication exposes several fault lines such as who has standing to sue considering that every state contributes to and is affected by climate change, what constitutes damage and what constitutes causation. There is substantial scholarship that deals with these questions. I will limit this post to look at the possibility of international adjudication more generally.

The current negotiation paradigm privileges state sovereignty over international prescription. Contentious issues are resolved through indeterminate notions that allow everyone to maintain their positions. This is because climate change law implicates almost every facet of a [states' domestic policy](#) – urban planning, agriculture, transportation etc. with enormous economic stakes. Resultantly, in many countries it is entangled in domestic politics. In the United States, for example, it has become a starkly partisan issue with some members of a major political party proudly declaring that they are climate sceptics.

Now, the theory of Sovereignty says that states should be allowed to govern themselves. They should be allowed to decide how to trade off different values such as climate protection and economic growth. But under the foundational no harm principle in international law, states' sovereign right to use their territory and resources finds its limit when there is significant transboundary harm. Thus, it is difficult to find a justification for according such deference to state sovereignty in the context of global externalities. This principle has been fleshed out in a series of

MEAs and decisions of the ICJ. Moreover, negotiations do not take into account if the initial allotment of property rights is unjust, thereby disproportionately impacting countries of the Global South. This ambivalence in climate negotiations can be evidenced by the fact that despite efforts of Global South states to establish an insurance mechanism to compensate vulnerable Global South states, populations and communities, for loss and damage from the outset of the negotiations, it took them twenty years to build sufficient negotiating capital to include the dimension of “loss and damages” in Article 8 of the Paris Agreement. This incidentally still does not provide a basis for liability or compensation. This is a polarizing issue for many Global North states and, although it features in the Geneva Negotiating Text, it is unlikely to gain traction through negotiation. Thereby the question of ensuring availability of adequate funding and other necessary support to address loss and damage in vulnerable states of the Global South remains. Even an unsuccessful ICJ decision in this regard could help in raising awareness, [norm creation](#) for building momentum towards and eventually catalyzing legislative and policy change .

In the [Pulp Mills](#) case, the ICJ clarified that the no harm rule includes an obligation of states to prevent harm to the environment of other states or to global commons such as the high seas or Antarctica, and by extension the Earth’s atmosphere. The court further clarified that the due diligence standard would be satisfied to place a duty upon states to prevent harm. But this standard is still very vague. The elaboration of more specific criteria of due diligence by an international tribunal could be helpful in providing a common basis for evaluation. Moreover, it is not only an injured state which can invoke the responsibility of another state. Since the obiter dictum of the ICJ in the *Barcelona Traction* case, international law understands that certain “obligations of the States are owed to the international community as a whole.” The ICJ has not explicitly ruled that environmental obligations have an *erga omnes* character, but the Court has consistently held that the no-harm rule and related procedural obligations will apply beyond national territory and even in the global commons. Several [commentators](#) have expanded on how the right of each state to invoke state responsibility is inherent in the concept of *erga omnes*. There is no ICJ ruling on this point, and neither is there clear state practice. In *Nuclear Tests (Australia v France)* some judges noted that “the idea of *actio popularis* may be considered capable of rational legal argument and a proper subject of litigation.” Interestingly, while a few states have considered legal action for climate change related damages to their territories, so far none have done so with regard to global commons.

This is another instance where international adjudication might step in. An Advisory Opinion by the ICJ might offer clarity on the legal implications of the no harm principle in the context of climate change beyond state territory, leaving the specifics to be worked out during negotiations as opposed to a contentious decision which might have negative spillovers for negotiations. Since all states could have their voices heard, such litigation would help raise public awareness on issues which have been sidestepped in negotiations and establish a common language for discussing these issues. Moreover, the ICJ’s jurisdiction to give an Advisory Opinion would not require consent of individual states, but it would have to be requested in accordance with the UN Charter. This procedure does not exclude other means of addressing

the problem nor does international law require exhaustion of negotiations to get to litigation. In fact, most multilateral environmental agreements including the United Nations Framework Convention on Climate Change explicitly consider adjudication as a method of dispute settlement, contingent on obtaining state consent. Thus, the criticism that was levelled against the ICJ in *Legal Consequences of Construction of Wall in Occupied Territories* that the Advisory Opinion infringed on the jurisdiction of another institute would be inapplicable.

Notwithstanding the forgoing, it is uncertain how much an adversarial model of law would help promote the collective action that is [needed](#) to tackle climate change. Adjudication represents a case#by#case, reactive, transaction#cost intensive approach which is far from optimal. Thus, negotiation might be our best shot at achieving our goals, but international adjudication might be a useful tool to consider as a supplement to negotiations.

Shubhangi Agarwalla is a student at National Law University Delhi and research assistant to Prof. Dire Tladi, Special Rapporteur on Jus Cogens, at the UN ILC.

Cite as: Shubhangi Agarwalla, "International climate change adjudication: A means to amplify voices of the global south?", *Völkerrechtsblog*, 7 October 2019.

